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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re NATHANIEL D., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. HAWAII D., et al., Defendants and Appellants.	D043822 (Super. Ct. No. EJ1915A)

APPEAL from a judgment of the Superior Court of San Diego County, Gary Bubis, Juvenile Court Referee. Affirmed in part; reversed in part, and remanded with directions.

Hawaii D. and Allen D., the parents of Nathaniel D., appeal the termination of their parental rights pursuant to Welfare and Institutions Code section 366.26.[1] Each

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1 All statutory references are to the Welfare and Institutions Code unless otherwise specified.

parent contends the juvenile court (1) failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C., § 1901 et seq.), and (2) erred by finding that Nathaniel was like to be adopted within a reasonable time.

FACTUAL AND PROCEDURAL BACKGROUND

Nathaniel was born in November 2000, with a positive toxicology for opiates. The San Diego County Health and Human Services Agency (Agency) filed a dependency petition on his behalf pursuant to section 300, subdivision (b), which was sustained. The court terminated jurisdiction with exit orders for Allen; Hawaii was to have supervised visitation and was not to reside in the home with Allen and Nathaniel. Shortly thereafter, Hawaii started living with Allen and Nathaniel.

On August 15, 2001, Allen hit Hawaii in the chest and face as they crossed a street; Hawaii became dazed and fell in the middle of the street. Police arrested Allen for spousal battery. Agency, which had learned that Hawaii was living with Allen in violation of the order from the earlier case, took nine-month-old Nathaniel into protective custody on August 24. Because Hawaii had obtained a restraining order against Allen, Agency did not take Nathaniel's older half siblings into custody.

On August 28, 2001, Agency filed a petition on behalf of Nathaniel under section 300, subdivision (b), alleging there was a substantial risk of harm to him because he had been exposed to numerous domestic violence incidents.[2]

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2 Agency also filed a dependency petition on behalf of Nathaniel's six-year-old half sister, Z.R. Her dependency case followed the same track as Nathaniel's case until her father, long thought to be dead, surfaced. Agency undertook an investigation of Z.'s father as a caretaker for her. Z. is not a subject of this appeal.

At the detention hearing on August 29, 2001, Hawaii and Allen filled out paternity questionnaires in which they stated Allen has or might have American Indian heritage with the Cherokee tribe. However, Allen's counsel told the court that he did not believe ICWA applied even though Allen's paternal great-grandmother was a member of the Cherokee tribe. Upon inquiry from the court, counsel said Allen was not a registered or enrolled member of the tribe. The court found ICWA did not apply.

On September 20, 2001, Hawaii submitted to the petition, Allen pled no contest, and the court sustained the petition. On October 26, the court ordered Hawaii and Allen to comply with their case plans.

In January 2002 Nathaniel underwent neurological examinations and was diagnosed with cerebral palsy. He also has asthma, eczema and speech delays.

Hawaii completed an outpatient drug treatment program, was compliant with the Substance Abuse Recovery Management System (SARMS), and attended parenting classes and a weekly domestic violence support group. Allen attended parenting classes, outpatient drug treatment, a domestic violence treatment program and was compliant with SARMS, except for drinking alcohol on New Year's Eve. The social worker reported both parents were cooperative.

On May 21, 2002, the court ordered six more months of reunification services for Hawaii and Allen.

Hawaii was compliant with SARMS until August 2002. On August 1, Hawaii screened positive for methamphetamine. Hawaii also turned in forged attendance slips for 12-step meetings. Allen tested positive for methamphetamine several times. He was

forced to leave his domestic violence treatment program because he missed too many classes. In October, Allen was arrested for violating conditions of his probation.

Although it initially proposed services be terminated for both parents, Agency recommended Hawaii receive six more months of services after she resumed compliance with SARMS and indicated her willingness to continue with reunification. On November 13, 2002, the court ordered six more months of services.

Later that month, Hawaii enrolled in an outpatient drug treatment and parenting classes. She did well until late January 2003, when she tested positive for methamphetamine. She also tested positive for methamphetamine the following week. SARMS recommended that Hawaii enter a residential drug treatment program. Hawaii told the social worker she was not willing to participate in any further services other than visiting her children.

Allen was sentenced to prison for his probation violations.

On June 23, 2003, the court terminated reunification services and set a section 366.26 hearing.

Allen was released from prison in July 2003.

The adoption assessment report described Nathaniel as "nearly three years old, but he is as big as some five-year-olds. He is 41 [inches] tall and weighs 41 [pounds]. He appears to be a clumsy child, but actually he has mild cerebral palsy which causes his gait to be slightly off and his motor skills delayed. . . . [H]e's very attractive with big brown eyes and an infectious smile. He is very affectionate, happy child who loves to 'help' his foster mother with whatever chore she is engaging in at the moment. He is a good eater

and loves just about all foods, including vegetables. He enjoys playing with his blocks and loves Barney videos. He can be quite willful and stubborn, but also is a child who is eager to please."

The report concluded that Nathaniel was adoptable based on his age, social ability and general attractiveness. Nathaniel's foster parents had planned to adopt him, but, after the foster mother became seriously ill, they changed their plans. According to the report, there were 11 other approved families interested in adopting a child with Nathaniel's characteristics.

The assessment report also said Nathaniel did not have a "sibling" relationship with his older half sister, Z., within the meaning of section 366.26, subdivision (c)(1)(E). Z. was one of Nathaniel's playmates, whom he saw once a week. They had not resided in the same home since he was nine months old.

The contested section 366.26 hearing was held on November 25, 2003, and January 20, 2004.

On January 9, 2004, Nathaniel underwent an evaluation by the Regional Center, which found he had mild mental retardation.

After the diagnosis became available, Agency rescreened its pool of approved prospective adoptive families and identified eight families who said they would be interested in adopting a child with Nathaniel's characteristics. The social worker who authored Nathaniel's assessment report testified that seven of the eight families were appropriate for Nathaniel. In addition, Agency planned to consider a respite care provider who indicated interest in adopting Nathaniel. The social worker, who has been

with Agency for 30 years—17 as an adoption worker—and has written between 400 and 500 other assessment reports, testified that the mental retardation diagnosis did not change her assessment of Nathaniel as adoptable.

DISCUSSION

I. *ICWA*

Hawaii and Allen contend the trial court erred in finding that ICWA did not apply, and Agency concedes there was error. We agree and shall remand with directions to order Agency to comply with the notice requirements of ICWA.

In 1978, Congress enacted ICWA to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families. . . ." (25 U.S.C. § 1902.) ICWA allows a tribe to intervene in dependency proceedings because the law presumes it is in the child's best interest to retain tribal ties and heritage and that it is the tribe's interest to preserve future generations. (*In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.)

ICWA sets forth specific notice requirements:

> "[W]here the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and their right of intervention." (25 U.S.C. § 1912(a).)

If the identity of the tribe cannot be determined, notice must be given to the BIA. (*Ibid.*; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 253.)

Because the notice requirement is designed to protect the interests of Indian tribes and Indian children, a parent cannot waive ICWA notice requirements. (*In re Marinna J.*

(2001) 90 Cal.App.4th 731, 735-736.) Similarly, the doctrine of invited error has no application. (*Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th at p. 257.)

The Indian tribe determines whether the child is an Indian child. (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 470.) " 'A tribe's determination that the child is or is not a member of or eligible for membership in the tribe is conclusive.' " (*Dwayne P. v. Superior Court*, *supra*, 103 Cal.App.4th at p. 255.)

Notice must be sent whenever there is reason to believe the child may be an Indian child. (Cal. Rules of Court, rule 1439(f)(5).) "[T]he juvenile court needs only a suggestion of Indian ancestry to trigger the notice requirement." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.)

The paternity questionnaires filled out by Allen and Hawaii indicated that Allen had or might have Indian heritage through a Cherokee tribe. This was sufficient to trigger the ICWA requirement to give notice of the proceedings to all Cherokee tribes and the BIA.

The comments by counsel that notwithstanding Allen's Cherokee heritage ICWA did not apply because Allen was not a registered or enrolled member of a Cherokee tribe did not establish the inapplicability of ICWA or excuse compliance with ICWA's notice requirements. Whether Allen was a registered or enrolled member of a tribe is not determinative. Enrollment is not required in order to be considered a member of a tribe; many tribes do not have written rolls. (*In re Desiree F.*, *supra*, 83 Cal.App.4th at p. 470; see also *United States v. Broncheau* (9th Cir. 1979) 597 F.2d 1260, 1263 [enrollment is not only means of establishing tribal membership].) It is up to the tribe—not the court

and not the parents or their counsel—to determine the validity of a claim of possible tribal affiliation.

We conclude the court erred when it found, at the detention hearing, that ICWA did not apply. Accordingly, we reverse and remand with directions that the court order Agency to comply with the notice requirements of ICWA and case law interpreting the federal statute. (See, e.g., *In re Karla C.* (2003) 113 Cal.App.4th 166.)[3]

II. *Adoptability Finding*

Hawaii and Allen contend Agency did not present substantial evidence that Nathaniel was likely to be adopted in a reasonable time. The contention is without merit.

At the section 366.26 hearing, the juvenile court is required to select and implement a permanent plan. If the child is likely to be adopted, adoption is the preferred permanent plan. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) The court may terminate parental rights "only if it determines by clear and convincing evidence that it is likely the [child] will be adopted." (§ 366.26, subd. (c)(1); see also *In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.)

The juvenile court focuses first upon the characteristics of the child that could create difficulty in locating a family willing to adopt—i.e., age, physical condition,

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[3] Agency, which concedes there was ICWA error, takes the position it can achieve compliance with ICWA by giving notice to all Cherokee tribes and it is unnecessary to notify BIA in this case. Agency relies solely on the language of the federal statute that requires notice be given to BIA if the identity of the tribe cannot be determined. (25 U.S.C. § 1912(a).) Under the circumstances of this case, which is now more than three years old, it would appear prudent for Agency to notify BIA as well.

developmental delays, and mental or emotional state. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649; see also § 366.22, subd. (b)(3).)

The court cannot use the fact that the child is not yet placed in a preadoptive home nor with a relative or foster family who is prepared to adopt the child as a basis to conclude that it is not likely the child will be adopted. (§ 366.26, subd. (c)(1).) "[I]t is not necessary that the [child] already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' " (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)

On the other hand, "the fact that a prospective adoptive parent has expressed an interest in adopting a child is evidence that the [child's] age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the [child]." (*In re Sarah M., supra,* 22 Cal.App.4th at pp. 1649-1650.) Whether there is a prospective adoptive family is a relevant factor for the court to consider, but is not determinative by itself. (*In re David H.* (1995) 33 Cal.App.4th 368, 378.)

Our review of a finding that a child is likely to be adopted is limited to determining whether the record contains substantial evidence from which a reasonable trier of fact could make the finding by clear and convincing evidence. (*In re Christiano S.* (1997) 58 Cal.App.4th 1424, 1431.)

Nathaniel has a host of problems: mild cerebral palsy; mild mental retardation; asthma; eczema; and speech and developmental delays. The cerebral palsy is not readily discernable but for his gait being slightly off and his motor skills delayed. He has

achieved sufficient coordination that he no longer needs occupational therapy. Nathaniel qualifies for special education and he receives speech therapy. Nathaniel's asthma and eczema are well controlled.

Notwithstanding these deficits, Nathaniel has a lot of positives. He is a good looking youngster with an engaging smile. Nathaniel is affectionate and generally well behaved. He is able to bond with his adult caregivers. At three years old, Nathaniel is still at a young enough age that is desirable for most people who are seeking to adopt children.

Further, but for the serious health problems of the foster mother, Nathaniel's foster parents would have adopted him. Eight other approved prospective adoptive families indicated they would be interested in adopting a child with Nathaniel's characteristics, including his recently diagnosed mental retardation. A local respite care provider also indicated an interest in adopting Nathaniel. This was the information before the court at the section 366.26 hearing.

These facts, particularly when coupled with the social worker's presumably well informed opinion that Nathaniel was adoptable, constituted convincing evidence he was likely to be adopted soon. (See *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224 [social worker's opinion that child was "generally adoptable" was evidence of child's adoptability]; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418, 1421 [under Evid. Code, § 720, social worker is considered expert on assessment and selection of dependent child's permanent plan].) The court was entitled to find the opinion of the experienced social worker credible and give great weight to her assessment. We cannot reweigh the

evidence or substitute our judgment for that of the trial court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

We conclude Agency met its burden to produce clear and convincing evidence that Nathaniel was likely to be adopted within a reasonable time. Substantial evidence supported the court's finding.

The parties have asked us to consider information developed after the judgment that they argue bears on the likelihood of Nathaniel being adopted within a reasonable time. We are precluded from doing so. As a reviewing court, we review the correctness of the juvenile court's judgment at the time of its rendition and upon the record that was before the juvenile court for consideration. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Accordingly we deny the parties' motions to augment the record.

Nathaniel's appellate counsel also urges us to use postjudgment evidence regarding the likelihood of Nathaniel being adopted. In the event that on remand Nathaniel is determined not to be an Indian child, counsel requests we direct the juvenile court to reinstate all findings and orders made under section 366.26 except for the order terminating parental rights. In effect, appellate counsel for Nathaniel is asking us to allow the court to proceed under section 366.26, subdivisions (b)(2) and (c)(3) if Nathaniel is found not to be an Indian child upon remand. Under these provisions, the court may identify adoption as the permanent placement goal and continue the section 366.26 hearing for up to 180 days to allow efforts be made to locate an adoptive home for a child who is characterized as "difficult to place" and for whom no prospective adoptive home is available. (§§ 366.26, subds. (b)(2) & (c)(3).) A child qualifies as "difficult to

place" only if there is no prospective adoptive home available because of the child's membership in a sibling group, because of the child's medical, physical or mental handicap, or because the child is seven years old or older. (§ 366.26, subd. (c)(3).)

Putting aside the propriety of considering a postjudgment issue, we note that counsel for Hawaii and Allen argued below that the court should rule under section 366.26, subdivision (c)(3). The court chose not to select this option. On this record, we cannot find the court abused its discretion.

DISPOSITION

The judgment terminating parental rights is reversed, and the matter is remanded to the juvenile court with directions to order Agency to comply with the notice requirements of ICWA and relevant case law interpreting ICWA. If, after proper inquiry and notice, a tribe claims Nathaniel is an Indian child, the juvenile court shall proceed in conformity with all provisions of ICWA. If, on the other hand, no response is received or no tribe claims that Nathaniel is an Indian child, the judgment terminating parental rights shall be reinstated.

HALLER, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.